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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91182604
Party	Defendant Vision Pharma LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Application Serial No. 77/226,994

Filed: July 11, 2007

Mark: VISRX

Published in the Official Gazette: December 25, 2007

CORNERSTONE BIOPHARMA, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91182604
)	
VISION PHARMA, LLC,)	
)	
Applicant.)	

**APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT
TO FED. R. CIV. P. 12(C) AND MEMORANDUM IN SUPPORT**

Applicant, Vision Pharma, LLC ("Vision Pharma"), by and through its undersigned counsel, hereby moves for judgment in its favor dismissing the present Opposition pursuant to 37 C.F.R. §§ 2.116 and 2.127, and Fed. R. Civ. P. 12(c), based on all pleadings, papers and orders of record in this case.

I. BACKGROUND FACTS

On February 22, 2008, Opposer Cornerstone Biopharma, Inc. ("Cornerstone") filed a Notice of Opposition against Vision Pharma's Trademark Application Serial No. 77/226,994 for the mark VISRX in International Class 005. In its Notice of Opposition, Cornerstone alleged that:

- Cornerstone was the owner of U.S. Registration No. 3,384,232 for the mark ALLERX for use in connection with “anti-allergy preparations, antihistamine preparations, and decongestant preparations in International Class 005.” Notice of Opposition, ¶ 8.
- Cornerstone was the owner of “common law rights in the mark ALLERX.” *Id.*
- Cornerstone’s product in connection with which it uses the ALLERX mark is the ALLERX Dose Pack, which is a prescription-only product. Notice of Opposition, ¶ 4.

Cornerstone alleges that Vision Pharma’s VISRX mark is confusingly similar to Cornerstone’s ALLERX mark, and registration of the VISRX mark will damage Cornerstone. Notice of Opposition, ¶¶ 18 – 22. Cornerstone further alleges that Vision Pharma is using the VISRX mark in connection with a “generic” version of the ALLERX Dose Pack. Notice of Opposition, ¶ 11. Vision Pharma has filed an Answer to the Notice of Opposition which denies that the VISRX mark is confusingly similar to the ALLERX mark, and made several counterclaims for cancellation of certain of Cornerstone’s marks.¹ However, for purposes of this motion, Cornerstone’s well-pleaded factual allegations are accepted as true. *Ava Enterprises v. P.A.C. Trading Group Inc.*, 86 USPQ2d 1659, 1660 (TTAB 2008).

II. LEGAL STANDARD AND ARGUMENT

A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) may be granted only where, as here, on the facts deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c); *see also Ava Enterprises*, 86 U.S.P.Q.2d at 1660 ((citing *Baroid Drilling Fluids Inc. v. SunDrilling Prods.*, 24 U.S.P.Q. 1048 (TTAB

¹ Vision Pharma does not, at this time, seek judgment on its counterclaims against Cornerstone.

1992)). Existence of a likelihood of confusion between two marks is a question of law. *Sweats Fashion Inc. v. Pannill Knitting Co. Inc.*, 4 U.S.P.Q.2d 1793, 1797 (Fed. Cir. 1987) (citations omitted). The factors considered in a determination of likelihood of confusion are:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
2. The similarity or dissimilarity and nature of goods or services as described in an application or registration or in connection with which a prior mark is in use;
3. The similarity or dissimilarity of established, likely-to-continue trade channels;
4. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing;
5. The fame of the prior mark (sales, advertising, length of use);
6. The number and nature of similar marks in use on similar goods;
7. The nature and extent of any actual confusion;
8. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion;
9. The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark);
10. The market interface between applicant and the owner of a prior mark such as (a) a mere "consent" to register or use; (b) an agreement provision designed to preclude confusion, i.e. limitations on continued use of the marks by each party; (c) an assignment of mark, application, registration and good will of the related business; (d) laches and estoppel attributable to owner of prior mark and indicative of a lack of confusion;
11. The extent to which applicant has a right to exclude others from use of its mark on its goods;
12. The extent of potential confusion, i.e., whether de minimis or substantial; and
13. Any other fact probative of the effect of use.

In re E.I. Du Pont de Nemours & Co., 177 U.S.P.Q. 563 (C.C.P.A. 1973). However, "one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is dissimilarity of the marks." *Ava Enterprises*, 86

U.S.P.Q.2d at 1660 (*quoting Champagne Louis Roederer S.A. v. Delicato Vineyards*, 47 U.S.P.Q.2d 1459, 1460 – 61 (Fed. Cir. 1998)); *see also Kellogg Co. v. Pack'em Enterprises Inc.*, 21 U.S.P.Q.2d 1142, 1144 – 45 (Fed. Cir. 1991).

A. There is No Likelihood of Confusion between the Marks as a Matter of Law

1. The Marks are Not Similar in Appearance, Sound, Connotation or Commercial Impression

The dispositive issue in this Opposition is that the VISRX mark is not similar to the ALLERX mark, and thus no likelihood of confusion exists between the marks as a matter of law. Vision Pharma's mark is VISRX. *See* Exhibit A. Cornerstone's mark is ALLERX. *See* Exhibit B. The marks are not similar in appearance or sound or commercial impression: the words are visually and aurally distinguishable. It is wholly unlikely that a purchaser would read or pronounce the two marks the same, and as such, no purchaser would be confused between the VISRX product and the ALLERX product. Judgment on the pleadings in favor of Vision Pharma is thus entirely appropriate. *Ava Enterprises*, 86 U.S.P.Q.2d at 1661 (granting motion for judgment on the pleadings due to dissimilarity of the marks at issue); *Pack'Em Enterprises*, 21 U.S.P.Q.2d at 1145 (affirming TTAB decision granting motion for summary judgment due to dissimilarities between the marks at issue). Even assuming that the products in connection with which the marks are used, and the channels of trade in which the products are sold are the same,² because the marks are so dissimilar, it is difficult to imagine that a purchaser could be confused between the

² For purposes of this motion, Cornerstone's allegations are deemed to be true; however, Vision Pharma does not admit or concede that the goods or channels of trade are the same.

two marks, particularly since the purchasers are highly sophisticated and careful consumers, as discussed in further detail below.

Moreover, the mere fact that the two marks both contain the suffix “-RX” does not create any similarity or likelihood of confusion between the marks. The letters “RX” are commonly recognized as an alteration of the symbol that is used at the beginning of a prescription. Thus, when used in connection with prescription pharmaceutical products, the “-RX” suffix is merely descriptive of these products. *See In re Pharmacy Fulfillment Services, LLC*, 2003 WL 1441970, *1-2 (TTAB 2003) (finding “RX” merely descriptive of pharmacy services); *In re Advanced Cardiovascular Systems, Inc.*, 2001 WL 873273, *1 (TTAB 2001) (noting that the term “RX” is descriptive or even generic, meaning “a prescription for medicine or a medical appliance.”) Because this part of the mark is merely descriptive, the relevant part of the mark for purposes of a likelihood of confusion analysis is the initial part of the mark. *See In re Shawnee Milling Co.*, 225 U.S.P.Q. 747, 748 (TTAB 1985) (noting that where the marks at issue are merely descriptive, the addition of other material to the marks is “sufficient to render the marks as a whole distinguishable.”); *In re S.D. Fabrics, Inc.*, 223 U.S.P.Q. 54, 55 (TTAB 1984) (no likelihood of confusion where common element of the marks at issue was of a “highly descriptive nature.”); *Sweats Fashion*, 4 U.S.P.Q.2d at 1796 (affirming TTAB finding of no likelihood of confusion on summary judgment because “the only similar element in the marks of the parties is a generic or highly descriptive term, and [] the remainder of the respective marks is sufficiently distinguishing”). The initial portions of the marks are substantially visually and aurally different, and do not even share any of the same

letters. The result is that the marks have different commercial impressions, and are thus not similar for purposes of a likelihood of confusion analysis, and there is simply no scenario under which Vision Pharma's VISRX mark could be confused with Cornerstone's ALLERX mark.

Here, it is clear that because there is no likelihood of confusion between the marks, there is no genuine issue of fact to be resolved, and Vision Pharma is thus entitled to judgment as a matter of law on Cornerstone's claims.

2. There is No Likelihood of Confusion between the Marks Because the Buyers are Highly Sophisticated


Additionally, the fourth DuPont factor weighs heavily in favor of a finding of no likelihood of confusion between the ALLERX and VISRX marks. The products in connection with which these marks are used are ***prescription drugs***; hence, the relevant individuals for purposes of a likelihood of confusion analysis are the pharmacists dispensing the drug, or the physicians prescribing it. Both of these classes of individuals are highly trained and sophisticated, and can readily distinguish between the marks. Additionally, they are likely to be diligent and careful in selecting the product prescribed or dispensed to the patient. In light of the dissimilarity of the marks, and the conditions under which they are prescribed and dispensed, it is extremely unlikely that these individuals are likely to be confused between the marks. There is thus no genuine issue of fact to be resolved, and judgment on the pleadings is due to be granted in favor of the Applicant.

III. CONCLUSION

For the reasons stated above, Vision Pharma respectfully requests that its Motion for Judgment on the Pleadings be granted in its entirety.

Dated: December 2, 2008

Respectfully submitted,



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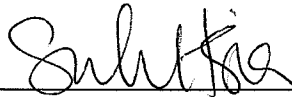
*Attorneys for Applicant,
Vision Pharma LLC*

CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that on this 2nd day of December, 2008, a copy of the foregoing Applicant Vision Pharma's Objections and Responses to Cornerstone's First Set of Interrogatories was served on counsel for Cornerstone by email and first class mail (postage prepaid) and addressed to the following:

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